

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 78  
5395915

BETWEEN                      FRIEDREICH GOSTMANN  
Applicant

A N D                              INDEPENDENT  
REFRIGERATION AND  
ELECTRICAL LIMITED  
Respondent

Member of Authority:        Rachel Larmer

Representatives:              Eska Hartdegen, Counsel for Applicant  
Susan-Jane Davies, Counsel for Respondent

Investigation Meeting:      29 October 2012 at Tauranga

Submissions Received:      14 February 2012 from Applicant  
27 February 2012 from Respondent

Additional Evidence:        28 February 2013 affidavit of Mrs Faber

Date of Determination:      05 March 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A. Independent Refrigeration and Electrical Limited (Independent Refrigeration) is ordered to pay Mr Friedrich Gostmann \$1,750 costs together with \$71.56 to reimburse his filing fee and \$22 for his photocopying charges.**



## **Employment relationship problem**

[1] In a determination dated 19 December 2012<sup>1</sup> the Authority held that Mr Gostmann had been unjustifiably dismissed. Mr Gostmann now seeks costs of \$10,720.50 being 70% of his actual costs of \$15,315.27. Mr Gostmann also seeks reimbursement of \$71.56 for his filing fee, \$22 for photocopying and \$447.68 for travel, meal and accommodation costs for his Auckland based counsel.

[2] This matter involved a shorter than usual one day investigation meeting which was primarily focused on remedies because Independent Refrigeration accepted from the outset that the procedure it had followed in relation to its termination of Mr Gostmann's employment was flawed.

[3] Independent Refrigeration submits costs should not be assessed using the Employment Court's usual percentage based approach. It says the Authority should adopt its normal tariff based approach to costs but that any costs awarded should be less than the current notional daily tariff of \$3,500 for reasons I discuss later.

[4] Independent Refrigeration seeks time to pay the costs awarded because it claims the jobs of its three current employees may be put in jeopardy if it is ordered to pay a lump sum.

### **Issues**

- [5] The issues to be determined include:
- a. How should costs be assessed?
  - b. What costs should Mr Gostmann be awarded?
  - c. Should disbursements be awarded?
  - d. Should Independent Refrigeration be given time to pay the costs awarded to Mr Gostmann?



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<sup>1</sup> [2012] NZERA Auckland 467.

### **How should costs be assessed?**

[6] I do not accept the percentage based approach that the applicant submits should be applied to costs in this case is appropriate. Instead I adopt the Authority's usual notional daily tariff based approach to costs. The starting point for an assessment of costs is therefore the current notional daily tariff of \$3,500. That notional daily tariff must then be adjusted in a principled manner to reflect the particular circumstances of this case.

### **What costs should Mr Gostmann be awarded?**

*Are there any factors which warrant an increase to the notional daily tariff?*

[7] Mr Gostmann relies on three factors to increase costs: first he says Independent Refrigeration's unsuccessful counterclaim increased his costs; second he says because his case was afforded urgency and was of great importance to him costs should be increased; third he says written submissions filed subsequent to the Authority's one day investigation meeting should also increase his award of costs.

[8] I do not accept that any of these factors should result in an increase to the notional daily tariff.

[9] In terms of the counterclaim, I found that Mr Gostmann misrepresented himself during the pre-employment stage of his employment. I consider that misrepresentation caused or significantly contributed to the counterclaim issues which Independent Refrigeration raised, although its own blameworthy conduct meant it was unable to establish liability for the damages it sought to recover from Mr Gostmann.

[10] I also note that Mr Gostmann's claims and the counterclaim were both heard in one short day, so I do not consider it appropriate or necessary to increase the notional daily tariff due to the unsuccessful aspects of the counterclaim.

[11] I do not accept that affording this matter urgency and the importance of the claim to Mr Gostmann and his family are factors which should increase the notional daily tariff because I do not accept that increased his costs.

[12] It is not unusual for parties to file written submissions after an investigation meeting and this does not necessarily increase the amount of costs to be awarded. There were serious deficiencies (discussed in more detail later) in Mr Gostmann's

first set of submissions which would make it inequitable to increase the notional tariff on that ground.

[13] I therefore decline to increase the notional daily tariff.

*Should the notional daily tariff be decreased?*

[14] I consider that there are a number of factors which warrant a decrease to the notional daily tariff.

[15] Independent Refrigeration had a measure of success because it successfully resisted reinstatement and it established that Mr Gostmann had misrepresented himself during the pre-employment stage of his employment.

[16] This matter also took less than one day, which should be reflected in the costs awarded.

[17] I consider that Mr Gostmann's conduct unnecessarily increased the length of the Authority's investigation meeting and therefore Independent Refrigeration's costs. Mr Gostmann omitted large amounts of information from his written statements filed in advance of the Authority's investigation meeting so considerable time was spent during the meeting obtaining this evidence from him.

[18] Mr Gostmann's first witness statement entirely omitted to address remedies which was a significant unexplained oversight given the Authority's investigation meeting was primarily remedy focused. Mr Gostmann was represented by counsel so such an omission is surprising.

[19] Because of this glaring omission Mr Gostmann was given additional time to file supplementary evidence. That resulted in Mr Gostmann filing at a late stage an additional statement and 26 additional documents, some of which appeared to include irrelevant qualifications and experience. I consider this unnecessarily increased Independent Refrigeration's costs.

[20] Costs should also reflect that Mr Gostmann was not wholly successful. His breach of contract claim, breach of good faith claim, penalties claim and claim for interest were all unsuccessful. He was unsuccessful in defending the misrepresentation claim and he did not obtain reinstatement which was the focus of his case.



[21] It is also of concern that Mr Gostmann filed an undertaking in support of his interim reinstatement application which (based on his and his wife's evidence to the Authority) appears could not have been met. Mr and Mrs Gostmann were asked to explain why they had filed an undertaking that they could meet any damages awarded by the Authority in circumstances where their evidence indicated they could not, but no satisfactory response to that query was forthcoming. I consider this is conduct which should be reflected in costs.

[22] Mr Gostmann also omitted to deal with all of the various claims he had made and which had been investigated by the Authority when he filed his submissions. That is again surprising given he had been represented by counsel from the outset. No explanation was ever provided for Mr Gostmann's failure to address each of his own claims in his submissions.

[23] Mr Gostmann was again given additional time to provide submissions in support of each of his claims which resulted in him filing a second set of submissions which addressed his earlier omissions. Independent Refrigeration then had to file a second set of submissions in order to respond to Mr Gostmann's second submissions. I find that again put it to unnecessary additional cost.

[24] Independent Refrigeration produced evidence about its financial circumstances which was supported by and expanded on in Mrs Faber's affidavit filed on 28 February 2013.

[25] Mrs Faber claims if Independent Refrigeration is ordered to pay a lump sum in the vicinity of \$3,500 that would jeopardise the financial viability of the company and could put at risks the jobs of the three employees currently employed by the business. Mrs Faber's affidavit sets out the financial situation of the business which includes a \$30,000 liability to Inland Revenue Department. Mrs Faber says that Independent Refrigeration has borrowed to fund the litigation and its ongoing expenses and liabilities and is now unable to borrow any more.

[26] I accept Mrs Faber's evidence that Independent Refrigeration is facing financial difficulties and that these have been increased because Mr Gordon Faber (the principal) has been off work with health issues and is unlikely to be able to work on the tools again until around early to mid July 2013. I consider that Independent



Refrigeration's financial position and inability to pay are factors which warrant a decrease to the notional daily tariff.

[27] For the reasons discussed above I consider the notional daily tariff should be reduced to \$1,750. I order Independent Refrigeration to pay Mr Gostmann \$1,750 towards his costs.

**Should disbursements be awarded?**

[28] Independent Refrigeration is ordered to reimburse Mr Gostmann \$71.56 for his filing fee and \$22 for his copying costs. However, I decline to reimburse him for the cost of his Auckland based counsel's travel to Tauranga and her associated accommodation and meal costs.

[29] It was Mr Gostmann's choice to decision to engage out of town counsel which meant additional costs associated with travel were incurred. I do not consider it appropriate for Independent Refrigeration to have to cover or contribute to the costs of Mr Gostmann's out of town counsel when local counsel would have been available without additional accommodation, travel and meal costs being incurred.

**Should Independent Refrigeration be given time to pay?**

[30] Independent Refrigeration asks that any costs award stipulates that payment may be made by monthly instalments. It is currently paying Mr Gostmann's wages and compensation awards at \$1,000 per month due to its precarious financial position.

[31] I order Independent Refrigeration to pay Mr Gostmann \$1,843.50 (being \$1,750 costs \$71.56 filing fee and \$22 photocopying) in three monthly instalments with the whole amount being paid by no later than 04 June 1013.

  
**Rachel Larmer**  
**Member of the Employment Relations Authority**

